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No. 03-1050

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GREEN LEAF NURSERY, INC. and GEORGE A. PENA,

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly construed a choice-of-law clause in a settlement to apply only to the scope and effect of the settlement, and not to require the application of Delaware law to determine the elements of tort claims, where the clause provided only that the settlement would be "governed and construed in accordance with" Delaware law.

2. Whether the Court of Appeals properly applied the requirement under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), of a "direct relation between the injury asserted and the injurious conduct alleged" in ruling that Petitioners could not pursue RICO claims for indirect injury resulting from their alleged "monitoring" of litigation misconduct in a case to which they were not parties.

3. Whether the Court of Appeals properly ruled that Petitioners had not been injured "by reason of" alleged predicate acts of mail and wire fraud, as required by the RICO statute, when the face of the parties' pleadings showed that Petitioners were aware of Respondent's alleged misrepresentations but did not reasonably rely and could not have reasonably relied on them.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly held company owns 10% or more of DuPont's stock. It is a publicly traded corporation listed on the New York Stock Exchange.

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INTRODUCTION

In this case, the Court of Appeals affirmed, in a lengthy decision, two extensive opinions of the District Court dismissing all of Petitioners' so-called "settlement fraud" claims. This decision involves straightforward issues of contractual construction under state law; settled rules of Florida state law; and the unremarkable application of this Court's rulings regarding RICO's proximate cause requirement. As with the prior dismissal of "settlement fraud" claims brought by similarly-situated plaintiffs, none of the issues raised by Petitioners warrants this Court's review. *See Kobatake v. DuPont*, 162 F.3d 619 (11th Cir. 1998), *cert. denied*, 528 U.S. 921 (1999).

As to the state law claims, contrary to Petitioners' assertions, the Eleventh Circuit's choice-of-law ruling reflects the application of settled Florida conflicts rules. The decision below embraced, rather than rejected, Florida Supreme Court decisions regarding both the effect of the choice-of-law clause in Petitioners' settlement agreements and the state law supplying the elements of their tort claims. The Florida Supreme Court decision that Petitioners say was disregarded did not deal at all with the choice of law applicable to the tort claims, as both the District Court and the Court of Appeals held (see Statement of the Case §§ 2(a), 3(a) & (b)). The opinion below applied settled substantive rules of Florida state law – including a decision answering a prior certified question – in upholding the dismissal of Petitioners' claims. The Court of Appeals' application of Florida state law principles does not warrant certiorari and, in any event, is manifestly correct.

Petitioner's alleged "circuit splits" regarding the Court of Appeals' RICO rulings parrot arguments raised in several petitions recently denied by this Court. *See Lerner v. Fleet Bank,*

N.A., 124 S. Ct. 532 (2003) (denying certiorari); *Sandwich Chef of Texas, Inc. v. Reliance National Indem. Ins. Co.*, 124 S. Ct. 101 (2003) (same); *Summit Properties, Inc. v. Hoechst-Celanese Corp.*, 531 U.S. 1132 (2001) (same). These alleged "conflicts" are illusory and turn on the varying facts of the cases. They provide no reason for this Court's review. In the end, Petitioners' RICO claims required nothing more than the straightforward application of settled proximate cause rules to the particular facts of this case.

Thus, this case presents no issues warranting this Court's review. The Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

These appeals arose from orders granting Respondent's motions for judgment on the pleadings, in which Petitioners' factual allegations were assumed to be true. Respondent therefore does not dispute, for present purposes, the Petitioners' discussion of the underlying facts giving rise to the parties' current dispute. However, Petitioners discussion of the prior proceedings in related "settlement fraud" cases and the cases below is misleading and calls for correction.

1. Petitioners mischaracterize the extensive proceedings in this case (and in related cases) leading up to the decision below.

a. This is one of a number of "settlement fraud" cases filed in or removed to the United States District Court for the Southern District of Florida on diversity grounds. Under basic *Erie* principles, the conflicts rules of the forum (Florida) apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

b. Consistent with *Klaxon*, in a prior appeal arising from a related case, the Court of Appeals had certified state law issues to the Florida Supreme Court. *See Mazzoni Farms, Inc. v. DuPont*, 166 F.3d 1162 (11th Cir. 1999). Specifically, the Eleventh Circuit asked whether a choice-of-law clause such as contained in Petitioners' settlement agreement – which provided that the settlements would be "governed and construed in accordance with" Delaware law – was enforceable in the face of a fraud claim. Pet. App. 233. The Florida Supreme Court ruled that the choice-of-law clause was enforceable and thus held that Delaware law governed the contractual issue of whether the release provision barred claims of fraudulent inducement. *Mazzoni Farms, Inc. v. DuPont*, 761 So. 2d 306, 310-313 (Fla. 2000). Nothing in the Florida Supreme Court's decision, however, purported to determine the law that would govern the fraud claim itself (or the other tort claims insofar as they were not precluded by the settlement).

Petitioners claim that the Florida Supreme Court adopted the approach of the *Restatement (Second) of Conflicts of Laws* §§ 187 & 201 (1979). Pet. 10. Those sections address whether a choice-of-law clause governs a claim to rescind or avoid the entire contract containing the clause. *Id.* The Florida Supreme Court, however, specifically refused to address this issue on the ground that the plaintiffs in *Mazzoni Farms* – like the Petitioners here – had elected to keep the settlement proceeds and thereby "affirm" their contracts (rather than rescind them):

> It is axiomatic that fraudulent inducement renders a contract voidable, not void. Consistent with the majority view, Florida law provides for an election of remedies in fraudulent inducement cases: rescission, whereby the party repudiates the transaction, or damages, whereby the party ratifies

> the contract. A prerequisite to rescission is placing the other party in status quo. . . . Moreover, a party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.
>
> A damages claim, by contrast, affirms the contract, and thus ratifies the terms of the agreement. This principle ensures that a party who "accepts the proceeds and benefits of a contract" remains subject to "the burdens the contract places upon him."
>
> As previously stated, the necessary precondition for rescission is tender of the benefits received under the contract. In effect, the nurseries elected to affirm the contract by not returning the settlement proceeds. As a result, they are bound by the terms of the contract, including the choice-of- law provision

761 So. 2d at 313 (citations and footnote omitted). In a footnote, the Florida Supreme Court specifically declined to decide whether to adopt the *Restatement*'s rule regarding the applicability of a choice-of-law clause to a rescission claim:

> We reiterate that because the nurseries have elected to affirm the contract, we do not have the occasion to consider whether the choice-of-law provision would remain operative if they had instead sought rescission.

Id. at 313 n.7. Thus, contrary to Petitioners' assertions, there is no "specific invocation of *Restatement* section 201" in the *Mazzoni Farms* decision (Pet. 11), but rather an express refusal by the Florida Supreme Court to reach the *Restatement* issue. Moreover, as developed below, the entire *Restatement* debate

is irrelevant, because the Florida Supreme Court was addressing contractual interpretation issues, not the substantive tort issues that are the subject of the Eleventh Circuit's rulings.

c. When the Eleventh Circuit certified the conflicts issues to the Florida Supreme Court, it recognized that the issue of the interpretation of the contractual settlement agreement under Delaware law might need to be certified to the Delaware Supreme Court. *See Mazzoni Farms*, 166 F.3d at 1165. Three months after the Court of Appeals certified the conflicts issue to the Florida Supreme Court, the District Court certified the contractual construction issue to the Delaware Supreme Court.

Specifically, the District Court certified to the Delaware Supreme Court the contractual interpretation question of whether the Petitioners' "settlement fraud" claims were barred by the release clause in their settlement agreement, in which they released Respondent from "any and all . . . claims . . . whether known or unknown . . . by reason of any fact or matter whatsoever." *See DuPont v. Florida Evergreen Foliage*, 744 A.2d 457, 459 (Del. 1999). The Delaware Supreme Court held that the release did not bar claims of fraudulent inducement of the settlement agreement and therefore did not preclude Petitioners' tort action at the outset. *Id.* at 462.

Contrary to Petitioners' claim (Pet. 6), the Delaware Supreme Court, having held that the settlement agreement did not foreclose the tort action, did not purport to require the application of Delaware law to the elements of the Petitioners' fraud claims. The District Court only asked, and the Delaware Supreme Court only addressed, a specific contractual interpretation issue of Delaware law: the scope and effect of the release clause with respect to a claim of fraud. *DuPont v.*

Florida Evergreen Foliage, 744 A.2d at 459-462. All parties here agreed that this narrow issue fell within the choice-of-law clause in the settlement agreement.

d. Thus, at the time Respondent filed the motions giving rise to the decisions below, the Florida Supreme Court had ruled as a matter of Florida conflicts law that Delaware law governed the contractual interpretation issue, and the Delaware Supreme Court had ruled (as a matter of Delaware contract law based on the facts alleged) that the release did not bar the claims. These rulings allowed Petitioners' claims to proceed past the initial hurdle of the release. They did not purport to dictate the substantive law applicable to the fraud and tort claims Petitioners were asserting or announce the conflicts analysis that would apply to these claims.

2. Petitioners compound their erroneous descriptions of the prior proceedings by mischaracterizing the District Court decisions in this case.

a. Because the Florida Supreme Court did not address the ***scope*** of the choice-of-law clause (an issue that had not been certified by Eleventh Circuit), that issue remained undetermined when the Court of Appeals remanded the case to the District Court. The first portion of the District Court's initial dispositive order, therefore, conducted the necessary analysis of the scope of the choice-of-law clause:

> [T]he decisions by the Supreme Court of Florida and Supreme Court of Delaware were limited to interpreting the construction and effect of the release and choice of law language. Neither opinion focused upon what substantive law should be applied to the plaintiffs' tort claims, assuming they were permitted to go forward. . . . Furthermore, the

> language in the release, upon a plain reading by the Court, is not broad enough to encompass tort claims. . . . The tort claims shall therefore be interpreted under Florida law.

Pet. App. 42-43 (citations omitted).

b. In an effort to bolster their argument that the Court of Appeals should have certified the substantive tort issues to the Florida Supreme Court, Petitioners claim that the District Court ruled "that certification of the state law issues to the Florida Supreme Court was probably warranted." Pet. 15. In the District Court's certification ruling (Pet. App. 83-84), there is not so much as a word that remotely could be construed as a finding by the District Court that certification of the state law issues was warranted. To the contrary, the trial court merely found, as required to certify the decision for interlocutory appeal under 28 U.S.C. § 1292(b), that "[r]easonable jurists could disagree with this Court's interpretation of the Florida and Eleventh Circuit precedent regarding litigation conduct and reasonable reliance. . . ." *Id.* Merely because the District Court held that its interpretation of state law issues should be reviewed on an interlocutory appeal in no way mandates that the Court of Appeals exercise its discretion to certify those issues to the Florida Supreme Court.

3. Petitioners likewise mischaracterize the Court of Appeals' decision.

a. Petitioners assert that the Court of Appeals "deliberately ignored the choice of law provision in the settlement contract." Pet. 7. As with the District Court, however, the Eleventh Circuit

began its substantive analysis with an examination of the scope of the choice-of-law clause:

> The choice-of-law clause provides that "[t]his release shall be governed and construed in accordance with the laws of the State of Delaware. . . ." The effect of this clause is narrow in that only the release itself is to be construed in accordance with the laws of the State of Delaware. The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the release. . . . Thus, the Delaware Supreme Court applied Delaware law only in determining the effect of the release, and held that the release did not bar Plaintiffs' fraudulent inducement claims.

Pet. App. 11-12. Thus, the question was not one of "enforce[ment]" of the choice-of-law clause (Pet. 7), but rather ***interpretation*** under state law of the scope of a valid choice-of-law clause.

b. Petitioners again mischaracterize the Court of Appeals' decision when they state that it "utterly ignored the Florida Supreme Court's earlier articulation of the relevant conflicts of law standards in cases such as these." Pet. 9. To the contrary, the Eleventh Circuit specifically considered and correctly rejected the very argument Petitioners press in this Court:

> Plaintiffs argue that *Mazzoni Farms* had already established that Delaware law governs the substantive elements of their claims. In *Mazzoni Farms*, this court certified to the Florida Supreme Court the question of whether the choice-of-law

> provision controls the release provisions of the settlement agreement. The court answered that the choice-of-law provision does control the release provisions of the settlement agreement and that Delaware law should be applied to determine whether the release barred Plaintiffs' fraudulent inducement claim. The Supreme Court of Delaware, in turn, held that the release in question does not bar fraudulent inducement claims.
>
> Neither *Mazzoni Farms* nor *Florida Evergreen Foliage*, however, dealt with the question of what state's substantive law should be applied to the Plaintiffs' tort claims. The Florida Supreme Court in *Mazzoni Farms* did not address what state's laws would govern the elements of any tort claims not barred by the release, and the Delaware Supreme Court in *Florida Evergreen Foliage* did not address the scope of the choice-of-law clause, the law applicable to the fraudulent inducement claims not barred by the release, or any other conflicts issues. Rather, *Mazzoni Farms* and *Florida Evergreen* Foliage dealt with whether the tort claims were still viable in light of the release. Therefore, neither *Mazzoni Farms* or *Florida Evergreen Foliage* determined that Delaware law governs the substantive elements of Plaintiffs' claims, as they contend.

Pet. App. 12-13. Thus, both of the courts below carefully considered and rejected Petitioners' arguments that the prior state Supreme Court rulings controlled the conflicts issue here.

4. Finally, Petitioners fail to describe adequately the RICO rulings of the courts below and then use their inadequate descriptions as the groundwork for their alleged "circuit splits."

Both the District Court and the Court of Appeals divided the Petitioners' RICO claims into two types of predicate acts: (1) obstruction of justice and witness tampering; and (2) mail and wire fraud. The courts below held (and Petitioners raise no issue in this Court) that the federal obstruction of justice and witness tampering predicates are limited to prior federal proceedings. The only federal proceeding alleged by Petitioners is the federal case styled *Bush Ranch v. DuPont* (a case to which Petitioners were not parties). The "indirect injury" rulings of the District Court and the Court of Appeals were limited to Petitioners' claimed injury from DuPont's alleged obstruction of justice and witness tampering in *Bush Ranch.*

Petitioners' assertions of mail and wire fraud, in contrast, rested on allegations of fraudulent litigation statements in their own underlying cases and in other cases their attorneys allegedly were monitoring (including *Bush Ranch*). Petitioners (or their agents) claimed to have heard and relied on the alleged misrepresentations. They did not claim injury based on misrepresentations to third parties which Petitioners did not hear or rely upon (but which nevertheless caused them injury).

These claims were rejected by both the District Court and the Court of Appeals on the ground Petitioners could not establish reasonable reliance. The pleadings established that, before and when the parties settled, Petitioners had accused and were accusing Respondent of making fraudulent litigation statements. Petitioners' current claims similarly allege that Respondent had made false litigation statements. This undisputed distrust of Respondent made Petitioners' alleged reliance unreasonable as a matter of law. These rulings thus

involved no claim that Petitioners had been injured without hearing and relying on the alleged misrepresentations, the critical fact in several of the cases addressed in the Petition.[1]

REASONS FOR DENYING THE PETITION

As shown above, Petitioners predicate their conflicts of law argument on misstatements regarding the prior proceedings in these and related cases. The record shows that the Court of Appeals applied and followed, rather than ignored, governing Florida state law on the conflicts issues and on the substantive legal issues supporting dismissal of Petitioners' state law claims.

Petitioners' elaborate efforts to manufacture circuit splits on the RICO issues similarly rest on out-of-context quotations and a misapprehension of the holdings of the cases. Ultimately, Petitioners fail to cite a single decision authorizing the RICO claims they sought to press here. Accordingly, the Petition for Certiorari should be denied.

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1. The District Court also held that Petitioners' RICO claims were barred by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a ruling not addressed by the Court of Appeals. Pet. App. 104-10. The trial court's ruling on this issue has been followed by several subsequent decisions. Accordingly, even if this Court reversed the RICO rulings, Petitioners' RICO claims would still fail.

I. THE COURT OF APPEALS FOLLOWED, RATHER THAN IGNORED, GOVERNING FLORIDA STATE LAW ON THE CONFLICT OF LAWS AND COMMON LAW TORT ISSUES

A. Contrary to Petitioners' Misstatements, the Court of Appeals Properly Analyzed and Applied the Governing Florida Conflicts of Laws Principles

As explained above, the Florida Supreme Court addressed the enforceability of the Delaware choice-of-law clause in the parties' prior settlement and its application to the construction and effect of the settlement, but did not address whether the clause called for the use of Florida law to supply the elements of Petitioners' separate tort claims. Consistent with the ruling that Delaware law applied to contractual interpretation and enforcement issues, the Delaware Supreme Court ruled that the release in the settlements did not bar fraud claims, but did not speak to any conflicts issues for determining the substantive law to govern those claims (nor could it, given that the conflicts issue is controlled by Florida and not Delaware law).

Both of the courts below expressly acknowledged and examined the prior certification rulings, but properly recognized the relationship between those rulings and the present case. Neither of those previous decisions purported to dictate the substantive law applicable to tort claims. The narrow choice-of-law clause did not itself, as a matter of state law, extend to Petitioners' tort claims against Respondent, and therefore those claims were subject to the usual state law choice-of-law and substantive tort principles. The conflicts of law rulings made by the courts below involved nothing more than a construction of the choice-of-law clause in the parties' settlement agreement.

Both the District Court and the Eleventh Circuit honored their *Erie* duty to follow the Florida Supreme Court's prior ruling that the choice-of-law clause was enforceable and supplied the law for contractual interpretation and enforcement issues. That is an entirely different question, however, from the issue decided by the courts below: whether the choice-of-law clause in the agreement was broad enough to apply to the substantive elements of Petitioners' tort claims.

The choice-of-law clause here provides only that "[t]his Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof." Pet. App. 223. As found by the courts below, this required the application of Delaware law to the issue of whether the release clause barred Petitioners' fraud claims, but did not contain the broader language necessary to require application of Delaware law to tort claims.

> The clause does not refer to related tort claims or to any and all claims or disputes arising out of settlement or arising out of the relationship of the parties. This type of narrow choice-of-law clause calls for the application of the selected law to determine only the scope and effect of the release

Pet. App. 11; *see also* Pet. App. 42-43 (choice of law clause "is not broad enough to encompass tort claims. . . . The choice of law provision does not state that any and all claims arising out of the relationship of the parties shall be governed by Delaware law, or anything to that effect").

This Court need not review the ruling construing the choice-of-law clause to be inapplicable to the fraud and tort claims,

which in any event was correctly decided by the courts below. Contrary to Petitioners' assertions, this ruling simply determined what claims were embraced by their choice-of-law agreement. And there is absolutely no indication that the courts below did not "lik[e]" the earlier conflicts ruling of the Florida Supreme Court. Pet. 10. To the contrary, both courts followed the ruling without question and addressed its application here.

B. The Court of Appeals' Decision in No Way Shows "Confusion" as to the Proper Application of *Klaxon*

Having determined that the choice-of-law clause governing interpretation of the settlement agreement did not purport to select the law governing the substantive elements of Petitioners' claims under state tort law, the courts below proceeded to another unremarkable issue: application of Florida's general conflicts rule for tort claims. Given that Florida was Petitioners' state of residence and the place where the events giving rise to the dispute occurred, Florida law applied to Petitioners' common law tort claims. Pet. App. 13-14; 42-43. Indeed, Petitioners expressly stated that they were bringing their tort claims under Florida law. Pet. App. 128.

This decision in no way represented the rejection of a "specific conflicts rule tailored to the particular situation at hand" (Pet. 10), because that "specific" conflicts rule announced by the Florida Supreme Court did not address this issue at all. The Court of Appeals was not presented with any choice "between two equally valid choice of law rules" (Pet. 11), because the rules addressed two different conflicts issues: the enforceability of the choice-of-law clause, on the one hand, and the conflicts rule applicable to tort claims not within the choice-of-law clause, on the other.

Nor did the Eleventh Circuit refuse to "enforce[] a forum's specific invocation of *Restatement* section 201." Pet. 11. In the first place, as noted above, the Florida Supreme Court specifically declined to address § 201 (whether a choice-of-law clause governs a claim to rescind an agreement) because it found that the plaintiffs there, like Petitioners here, had retained the settlement proceeds and thereby "affirmed" the settlements. Under these facts, the Florida Supreme Court in *Mazzoni Farms* held that the choice-of-law clause was enforceable as written.

In the second place, the § 201 issue has nothing to do with the issue addressed by the Court of Appeals: whether the choice of law encompassed the substantive law for tort claims. Merely holding that the choice-of-law clause was ***valid*** did not purport to resolve the entirely separate issue of the clause's ***scope***. On this issue, the authorities agree that a clause such as that in Petitioners' settlement does not encompass separate tort claims. Pet. App. 11-12, 42-43. Petitioners do not identify conflicting authorities, much less show a ground for certiorari on this state law issue.

Finally, Petitioners do not explain how the Eleventh Circuit "obliquely questioned the continued wisdom and vitality of *Klaxon*, and openly considered whether they should create an independent general law of conflicts of laws." Pet. 13. To the contrary, the Court of Appeals favorably cited *Klaxon* and faithfully followed its dictates. Pet. App. 13.

C. Petitioners' Certification Argument is Spurious

Although Petitioners claim that the Eleventh Circuit should have certified the state law issues to the Florida Supreme Court (Pet. 14-17), they concede that the issue ultimately falls within

the Court of Appeals' "sound discretion." *Id.* 15. Petitioners fall far short of even a colorable showing that the Court of Appeals abused its discretion.

As shown above, Petitioners rely on misstatements as to the conflicts issue resolved in *Mazzoni Farms* and the interlocutory certification ruling of the District Court. In fact, the Florida state law rules at issue are well-settled and inappropriate for certification, and Petitioners make no showing to the contrary.

The litigation privilege ruling, for example, was based on a Florida Supreme Court decision issued in response to a certified question from the Eleventh Circuit just ten years ago. *See* Pet. App. 14-18 (following *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994)). Certification procedures were not intended to allow a federal Court of Appeals to ask a state Supreme Court if it meant what it said when it answered a certified question ten years earlier.

The reasonable reliance rule applied by the Court of Appeals is similarly well-settled. *See* Pet. App. 19-22 (following *Mergens v. Dreyfoos*, 166 F.3d 1114, 1118 (11th Cir. 1999) (following *Pettinelli v. Danzig*, 722 F.2d 706, 710 (11th Cir. 1984))); *see also* Pet. App. 70-72, 78-80 (collecting additional Florida law decisions applying the reasonable reliance rule, including the landmark Florida Supreme Court decision in *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 116 Fla. 464, 156 So. 893 (1934)). Certification is not appropriate for a state law rule applied without reservation by state and federal courts for seventy years.

Petitioners also rely on the District Court's decision to certify its first decision for immediate appeal to the Eleventh

Circuit pursuant to 28 U.S.C. § 1292(b). In entering that certification, it stated that "[r]easonable jurists could disagree with this Court's interpretation of the Florida and Eleventh Circuit precedent regarding litigation conduct and reasonable reliance." Pet. App. 83-84. Since that ruling, the Court of Appeals unanimously has agreed with this interpretation. It is not and cannot be the rule that the mere fact a District Court certifies state law issues under Section 1292(b) mandates that the Court of Appeals in turn certify the issues to the pertinent state Supreme Court. Accordingly, certification was unwarranted.

II. PETITIONERS' RICO ARGUMENTS DO NOT DEMONSTRATE A CONFLICT AND PROVIDE NO BASIS FOR CERTIORARI

The RICO statute requires that the plaintiff show injury to its business or property "by reason of" the defendant's racketeering activity. 18 U.S.C. § 1964(c). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court interpreted Section 1964(c) to incorporate common law proximate cause concepts into RICO.

Petitioners assert circuit splits on two specific applications of the requirement that a civil RICO plaintiff demonstrate injury "by reason of" racketeering activity (18 U.S.C. § 1964(c)). They are wrong on both the existence of the conflicts and on the merits of their argument. Indeed, Petitioners essentially repeat the same arguments urged in several recent unsuccessful petitions for certiorari.[2] Nothing has changed since this Court declined to review these issues, and there is no reason for a

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2. *See Lerner v. Fleet Bank, N.A.*, 124 S. Ct. 532 (2003) (denying certiorari); *Sandwich Chef of Texas, Inc. v. Reliance National Indem. Ins. Co.*, 124 S. Ct. 101 (2003) (same); *Summit Properties, Inc. v. Hoechst-Celanese Corp.*, 531 U.S. 1132 (2001) (same).

different disposition here. In the end, Petitioners' arguments reflect a misapprehension of the cited cases and a misunderstanding of this Court's clear ruling on the proximate cause concepts embodied in § 1964(c).

A. Petitioners' "Indirect Injury" Argument Does Not Involve a Conflict and Fails to Show That This Case is Appropriate for Further Review

In this case, the Eleventh Circuit held – and Petitioners do not challenge here – that the federal obstruction of justice and witness tampering predicates are limited to federal proceedings and that the "only federal case in which [Petitioners] allege any of the predicate acts took place is the *Bush Ranch* case." Pet. App. 25-26. Petitioners were not parties to *Bush Ranch*, and the *Bush Ranch* court and *Bush Ranch* plaintiffs obviously were the most direct victims of any alleged misconduct there.

The Court of Appeals quoted *Holmes* for the proposition that parties (such as Petitioners) complaining of harm "'flowing merely from the misfortunes visited upon a third person by defendant's acts [are] generally said to stand at too remote a distance to recover.'" *Id.* at 26 (quoting *Holmes*, 503 U.S. at 268-69). Petitioners' harm here flows from DuPont's alleged misconduct towards the *Bush Ranch* plaintiffs and court.

With respect to Petitioners' claim that DuPont specifically intended to deceive all of the parties who allegedly were "monitoring" the *Bush Ranch* case (including Petitioners), the Eleventh Circuit explained that "the directness inquiry is not a question of specific intent." *Id.* at 27 (citing *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)). As explained in *Holmes*, the proximate cause question turns on considerations wholly

unrelated to intent, such as "ideas of what justice demands, or of what is administratively possible and convenient." 503 U.S. at 268 (internal quotation marks and citation omitted). Even where an act is alleged to injure both an immediate victim and a more remote victim, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Id.* at 271 (internal quotation marks and citations omitted).

Here, there is no dispute that Petitioners were not the most immediate victims of DuPont's alleged litigation misconduct in *Bush Ranch*. Accordingly, the Court of Appeals concluded that Petitioners had not shown injury "by reason of" DuPont's alleged obstruction of justice and witness tampering in that case. Pet. App. 27-28.

1. Petitioners' Claims Do Not Implicate their Alleged "Convergence" Issue

Petitioners argue that the Eleventh Circuit's ruling here represents the view of a minority of circuits requiring "convergence." By this term, Petitioners refer to an asserted rule of law that "only those plaintiffs who were the immediate recipients of the defendant's ***misrepresentations*** may recover from the defendant under RICO." Pet. 20 (emphasis added).

Neither of the courts below, however, applied the indirect injury rule to the alleged misrepresentations and thus did not bar the claims of mail and wire fraud on that ground. Instead, both courts applied the indirect injury rule to a very narrow and specific set of allegations: alleged acts of obstruction of justice and witness tampering in *Bush Ranch*.[3]

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3. In addition, the extremely limited time period in which these acts allegedly occurred – two months at the most – is too short to satisfy the RICO requirement of "a series of related predicates extending over

(Cont'd)

In this Court, Petitioners do not raise – indeed, they do not mention – the obstruction and tampering predicate acts for their RICO claims. They address their "convergence" argument solely to the predicate acts of mail fraud and wire fraud. With respect to the latter acts, however, the Court of Appeals did not rely on any "convergence" theory in rejecting Petitioners' argument. The dismissal of these claims was affirmed by the Eleventh Circuit on the ground that Petitioners could not establish reasonable reliance on Respondent's alleged misrepresentations.

Accordingly, by challenging the judgment below on a ground that was not the basis for the Court of Appeals' ruling, Petitioners ask this Court to decide a "strawman" issue that would not result in a reversal even if decided in Petitioners' favor.

2. There is No Circuit Split as to the Non-Controlling "Convergence" Rule

In any event, the cases cited by Petitioners do not demonstrate a circuit conflict as to whether a RICO plaintiff must be the "immediate recipient" of a misrepresentation to recover.

a. Four of the cases identified by Petitioners as rejecting "convergence" have absolute nothing to do with the interpretation of *Holmes'* direct injury requirement. Two cases are criminal cases, which necessarily involve no decision as to whether the "by reason of" civil RICO requirement has been

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(Cont'd)

a substantial period of time." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989) ("continuity" requirement not satisfied by alleged predicate acts "extending over a few weeks or months and threatening no future criminal conduct").

met. *See United States v. Christopher*, 142 F.3d 46 (1st Cir. 1998) (affirming convictions for, *inter alia*, wire fraud); *United States v. Blumeyer*, 114 F.3d 758 (8th Cir. 1997) (affirming convictions for, *inter alia*, mail and wire fraud). Two of the cases pre-date *Holmes*, and thus cannot be characterized as having "interpreted" it. *See Environmental Tectonics v. W.S. Kilpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

b. Another case cited by Petitioners neither approves nor rejects a rule limiting RICO claims to the "immediate recipient" of a misrepresentation. In *Mylan Laboratories, Inc. v. Matikari*, 7 F.3d 1130, 1136 (4th Cir. 1993), the RICO plaintiff was allowed to base a RICO claim on alleged misconduct in the defendants' dealings with a third party (the FDA). In the portion of the case cited by Petitioners, the only reference to a limitation of civil RICO claims to the "immediate recipient" of a misrepresentation occurs in the discussion of the trial court's alternative grounds for dismissing the RICO claims. *Id.* at 1137. The Fourth Circuit did not analyze the correctness of this holding, however, because the plaintiff sought an opportunity to amend the RICO claims. *Id.*

c. Three of the cases identified by Petitioners as adopting "convergence" (and thereby imposing a categorical limitation of RICO claims to "immediate recipients of the defendant's misrepresentations") represent a straightforward application of the indirect injury rule announced in *Holmes*. These cases turn on the question whether – as an objective matter and apart from the defendant's specific intent – the racketeering activity was directed primarily to the plaintiff or instead to a different person or entity. Under that approach, the court in each case carefully measured the particular plaintiff's theory of RICO injury against

Holmes and rejected the claims because the allegedly injurious conduct was directed primarily at third parties. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir.) (recovery disallowed when racketeering activities directed primarily at third parties), *cert. denied*, 124 S. Ct. 532 (2003); *Israel Travel Advisory Service v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (recovery disallowed when plaintiff competitor's harm was merely derivative of direct harm suffered by consumers); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924 (9th Cir. 1994) (recovery disallowed when plaintiff's harm was derivative of direct injury). The ultimate rule of law announced in these cases is that, when the alleged racketeering acts are directly primarily at a party other than the plaintiff, as confirmed by an analysis of *Holmes*, then the plaintiff cannot recover for its indirect injury.

These decisions support the Court of Appeals' ruling in this case. Here, the acts that allegedly injured Petitioners were directed primarily at third parties (the *Bush Ranch* plaintiffs and court). Accordingly, the decision below does not conflict with the cited cases.

d. A decision Petitioners cite as rejecting the "convergence" rule undertakes the same examination of *Holmes* as the above-cited cases. That decision, however, allowed the RICO claim to proceed, because the plaintiff's particular theory of RICO injury did *not* depend on indirect injury from conduct directed primarily at third parties. *See Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993) (recovery allowed when plaintiff's harm flowed directly from bribery of public officials). Again, however, there is no analysis of the acceptance or rejection of any "convergence" requirement. To the contrary, the reasoning employed in this case – an analysis of whether there is a more directly injured party and a weighing of the *Holmes* policies –

fully accords with the reasoning employed by the Court of Appeals in this case and with the other decisions cited above.

e. Finally, the Fifth Circuit's decision in *Procter & Gamble v. Amway*, 242 F.3d 539 (5th Cir. 2001), presents an atypical indirect injury issue that is different from, but in no way in conflict with, the present case. Petitioners' claim entails none of the circumstances involved there.

In *Procter & Gamble*, the RICO plaintiff (P&G) sought to recover from a defendant (Amway) whose representatives had spread false rumors that P&G was affiliated with Satanism. As a result, some customers who heard these misrepresentations boycotted P&G and gave business to Amway.

The Fifth Circuit expressly acknowledged that RICO claims predicated on fraud typically require proof of direct reliance by the immediate victim of the fraud. *Id.* at 564. Indeed, the court cited controlling law in the circuit for that principle. *Id.* (citing *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001)). By its terms, however, this rule does not apply in the unusual circumstance where racketeering conduct *directed at* and *injurious to* the victim and not to a third party is accomplished through misrepresentations made solely to that third party and not to the victim. *Id.* at 564-65.

Allowing recovery by a party who did not even hear (and thus did not "rely") on the misrepresentation in the unusual circumstances of *Procter & Gamble* accords with the indirect injury rule in *Holmes*. In that situation, the fraud is directed to the victim and not to the third parties to whom the misrepresentations are made (and who are thus mere "instrumentalities" of the fraud rather than the direct victims).

The victim's injury is solely attributable to the RICO harm; recovery need not be apportioned among multiple injured parties; and the directly injured party is seeking recovery.

In this case, in contrast, the plaintiffs and the court in *Bush Ranch*, not Petitioners, were the direct victims of Respondent's alleged litigation misconduct. Under Petitioners' own allegation, Respondent's misconduct was directed at these victims; Petitioners do not claim and have never alleged that the *Bush Ranch* parties and court were uninjured "instrumentalities" of racketeering activities directed towards Petitioners. Thus, Petitioners' RICO claims cannot stand under the indirect injury rule of *Holmes*, and there is no conflict with respect to that issue.

B. The Circuits Are Not Divided on Whether a Civil RICO Plaintiff Who Claims to Have Been the Recipient of a Misrepresentation Must Show That Reliance on the Misrepresentation Was Reasonable

1. The Lower Courts' Mail and Wire Fraud Rulings

Petitioners' RICO claims predominantly were based on mail and wire fraud. According to Petitioners, they (or their attorney) heard or received allegedly false litigation statements (such as allegedly incomplete discovery responses) by DuPont in their underlying cases and in other underlying Benlate®-related cases, and decided to settle based on the tainted "evidentiary record" created by those misrepresentations.

The courts below rejected these claims on the ground that Petitioners could not show that their alleged reliance on the purported litigation statements was reasonable, given that Petitioners and others repeatedly had accused DuPont of making

false litigation statements at the time of settlement. Petitioners' claims therefore squarely implicated a "reasonable reliance" rule developed in the "settlement fraud" context: "When negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." Pet. App. 19 (internal quotation marks and citation omitted); *see also id.* at 25.

2. Petitioners Fail to Demonstrate a Circuit Conflict on Whether a RICO Plaintiff's Reliance Must Be Reasonable

The legal issue resolved in the decisions below was whether a RICO plaintiff who claims injury by reason of direct reliance on an alleged misrepresentation is required to establish that its reliance was reasonable. In deciding that issue, there was no factual question whether Petitioners (and their attorney) actually heard or received the misrepresentations, and thus no question was presented as to whether a RICO plaintiff can satisfy proximate cause when it did not receive the misrepresentation. Indeed, the very crux of Petitioners' theory was that there had been reliance. The courts below rejected Petitioners' claims on the ground that such actual reliance was legally unreasonable. This issue was properly decided by both courts and presents no conflict in the circuits.

In the typical case, a party alleging RICO fraud (like any other type of fraud) claims to have heard a misrepresentation and acted in reliance thereon. Requiring the plaintiff to have acted in reasonable reliance on the misrepresentation ensures that its injury occurs "by reason of" the racketeering activity. *See, e.g.*, *Pelletier v. Zweifel*, 921 F.2d 1465, 1508 (11th Cir. 1991) ("[u]nless an untrue statement is believed and acted upon, it can occasion no legal injury") (internal quotation marks

omitted). The courts of appeals uniformly hold that, in such a situation, a RICO plaintiff must establish that it actually relied on the misrepresentation and that such reliance was reasonable. *See, e.g., id.; Bank of China v. NBM LLC*, 359 F.3d 171, 176 (2d Cir. 2004); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994).

The decision below accords with this unbroken line of cases. Here, Petitioners claim to have received and relied on DuPont's alleged misrepresentations. Accordingly, they must show that their reliance on the misrepresentations was reasonable. This they failed to do in light of their belief and allegation at the time that Respondent was engaged in a fraudulent scheme to deceive them. The Court of Appeals' fact-specific ruling in this regard was correct and raises no conflict or other ground warranting this Court's review.

In contrast to the typical RICO fraud case – including the present one – some RICO cases involve plaintiffs who seek to recover despite not having heard and acted upon the alleged misrepresentation. The *Procter & Gamble* case discussed above is an example. There, the RICO plaintiff did not hear, and therefore did not rely upon, the misrepresentations that were made to third parties. Nevertheless, the court allowed a RICO claim because the plaintiff was the party directly injured by the misrepresentations to the third parties. The third parties themselves suffered no direct harm, but instead were instrumentalities for the injury to the RICO plaintiff.

When a scheme to defraud a victim is effectuated through an alleged misrepresentation to a third party, proximate cause in *Holmes* still requires reliance, but it is sufficient that the third party recipient of the misrepresentation reasonably relied.

See, e.g., *Procter & Gamble*, 242 F.3d at 565 (when victim is injured by means of misrepresentations to third parties, the third party recipients' "reliance suffices to show proximate causation"); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (scheme to defraud accomplished through misrepresentations to Public Service Commission requires proof that "misrepresentations to the PSC were relied upon by the PSC").

The decisions cited by Petitioners for the alleged "conflict" fall into this category. Those cases, however, do not establish a conflict but rather only the existence of two different rules of decision for two different and distinguishable types of cases. For example, in *Systems Mgmt, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), the alleged misrepresentations were made entirely to a third party and not to the plaintiff-victim that was injured by them. *See id.* at 104 (fraudulent scheme to defraud plaintiff-victim was effectuated "by deceiving" the third party, who relied on misrepresentations in causing RICO injury to direct target of fraudulent scheme) Indeed, in that case the defendant did not contest causation (or proximate cause) at all.

The absence of a conflict is made plain by the co-existence in individual circuits of these two rules of decision that Petitioners contend are irreconcilable. Indeed, although Petitioners do not acknowledge it, their own Petition establishes this reality. Petitioners assert (Pet. 23 & n.5) that the Fifth Circuit has "waffled" on which of the two rules is correct. In fact, however, the cited decisions clearly establish that the court of appeals has applied one or the other of these rules depending upon which of the above two fact patterns is presented. The same is true in other circuits. *Compare, e.g.*, *Bank of China*, 359 F.3d at 176 (where the Second Circuit noted that "it is well established in this Circuit that, where mail fraud is the predicate

act for a civil RICO action, the proximate cause element articulated in *Holmes* requires the plaintiff to show 'reasonable reliance'"), *with Long Island Lighting*, *supra*, (cited at Pet. 22 as a decision of the Second Circuit allegedly in conflict with the reasonable reliance principle recently affirmed in *Bank of China*). This settled law in the circuits refutes rather than establishes a conflict and reflects nothing more than the courts of appeals' consistent recognition and application of different rules of proximate cause under *Holmes* in two different and distinguishable factual contexts that tend to recur in civil RICO fraud cases.

The instant litigation presents the typical RICO case rather than the unusual situation involved in *Proctor & Gamble* and *Systems Management*. Here, Petitioners alleged – indeed, their RICO claims hinge on – their reliance in fact on the misrepresentations that they actually heard or saw. In those other cases, by contrast, a non-injured third party was used as the instrumentality for causing injury to a direct victim that did not itself receive the misrepresentation. In these circumstances, Petitioners can advance no conflict or other reason for intervention by this Court.[4]

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4. Indeed, the court of appeals held that Petitioners' reliance was legally unreasonable. It is hard to conceive of *any* rule of proximate cause under *Holmes* that would allow a RICO plaintiff to proceed in the face of the conclusion that its conduct was legally unreasonable.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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